

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARRELL JOHNSON,

Plaintiff,

v.

CAROL PORTER *et al.*,

Defendants.

Case No. C06-5342RBL

REPORT AND
RECOMMENDATION TO
DISMISS COMPLAINT
WITHOUT PREJUDICE

**NOTED FOR:
March 9, 2007**

This case has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B). This matter comes before the court upon plaintiff's request/motion to voluntarily dismiss his complaint, (Dkt. # 18). The court entered an order to amend the complaint and despite a number of extensions of time, plaintiff has failed to do so. On January 17, 2007, plaintiff sought yet another extension of time, That motion has been denied. Plaintiff asks, in the alternative, that he be allowed to withdraw his complaint (Dkt. # 18). The Court recommends the action be **DISMISSED WITHOUT PREJUDICE**.

DISCUSSION

Under Rule 41, a plaintiff has the right to voluntarily dismiss his case when no answer or motion for summary judgment has been filed by an adverse party. Rule 41(a)(1) specifically provides that dismissal as a matter of right can be foreclosed only by the filing of an answer or a motion for summary judgment. Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Mississippi, 1992). When ruling on a motion to dismiss without prejudice,

1 the district court must determine whether the defendant will suffer some plain, legal prejudice as a result of the
2 dismissal. Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir.1994); Hamilton v. Firestone Tire & Rubber
3 Co., 679 F.2d 143, 145 (9th Cir.1982).

4 Here, the complaint has not been served. Thus, plaintiff has a right to dismiss the action.

5 CONCLUSION

6 Accordingly, plaintiff's request to voluntarily dismiss his complaint (Dkt. # 18) should be **GRANTED**.
7 A proposed order accompanies this report and recommendation.

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9 Dated this 9 day of February, 2007.

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11 /S/ J. Kelley Arnold
12 J. Kelley Arnold
13 United States Magistrate Judge
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